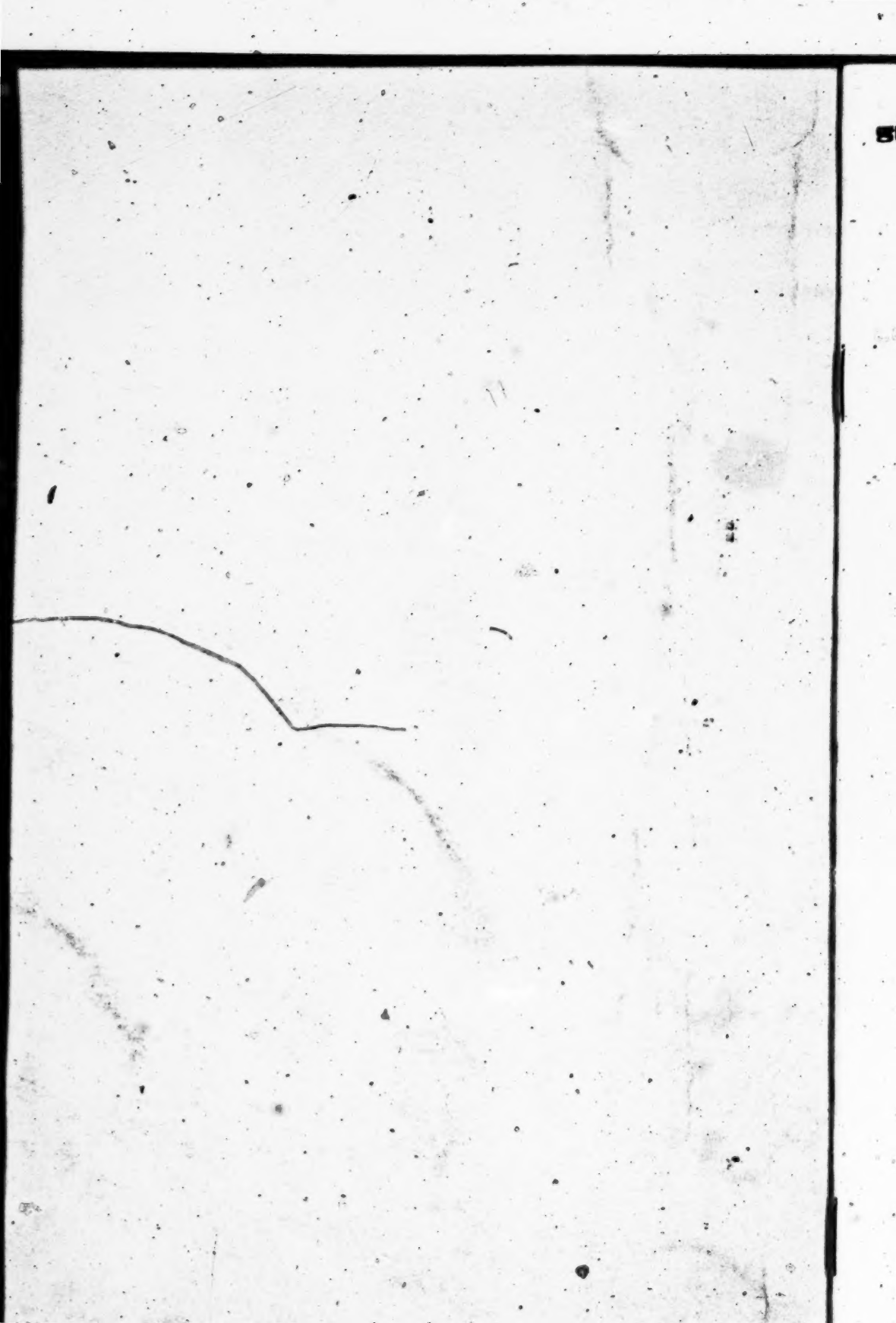

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IN THE

Supreme Court of the United States

October Term, 1968

No. 467

DAVID JUAIRE,

Petitioner,

vs.

WALTER MARSHAK, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported *sub nom. Juaire* v. *Nardin*, 395 F. 2d 373 (2nd Cir. 1968), and printed in Petitioner's Appendix, p. 12.

Questions Presented

1. Were the police department reports properly admitted in evidence?
2. Was the summation of defendant's counsel so improper as to entitle plaintiff to a mistrial?
3. Did the Trial Court err in its charge on negligence and contributory negligence?

Statement of the Case

In his recitation of the facts, besides making various misstatements, petition loses sight of the rule which requires that the evidence must be taken most favorably to the respondent, since the jury rendered a verdict in its favor. *Bomeisler* v. *M. Jacobson & Sons Trust,* 118 F. 2d 261, 262 (1st Cir. 1941), *cert. denied,* 314 U. S. 630 (1941).

It was only plaintiff who claimed that he was struck by defendant's car as he stood on the shoulder of the highway (33a-36a).*

Nardin, the driver of defendant's car, testified that at about 1:00 A.M. he was driving in an easterly direction along a wooded area, 2½ miles from Provincetown, on a two-lane highway just under 20 feet wide, unlit by street lights, but made fairly visible by a full moon (7a, 16a, 60a, 2b, 17b). According to Nardin, who was corroborated in most of the essential details by two eyewitnesses, he was travelling between 25 to 30 or 30 to 40 MPH in a 40 MPH Zone and had just proceeded up a small rise when he and his passenger observed plaintiff directly in front of them, either prone or on his hands and knees in the center of the east bound lane (22a, 57a, 58a, 61a, 2b, 9b, 17b, 18b). Nardin slammed on his brakes and swerved to the left, but plaintiff was struck by the front right side of the car and knocked off the road to the right (10b, 11b, 18b, 19b, Stenog. Min. p. 529). There was a hill just before the place of the accident which prevented him from seeing plaintiff (61a, Exh. B, 70a, Exh. I, 72a, 19b).

The statement in the petition (p. 5) that defendant's car "was identified by an independent witness as speeding

* References followed by "a" or "b" are to the printed appendices of petitioner and respondent respectively, in the Court below.

in excess of the legal limit" is well answered in the opinion of the Court below at p. 376:

> "The only testimony that Nardin might have been exceeding the speed limit came from Kinraide, who testified that the car in which he was a passenger was probably going from between 40 and 50 MPH and that the defendant's car, coming from the opposite direction, was going approximately the same rate. However, he was not watching the speedometer in the car in which he was riding and was not in a very good position to make an accurate estimate of the speed of the oncoming car."

Contrary to the assertion in the petition (p. 7) that none of the witnesses testified that plaintiff was drunk, Kinraide testified he could not recall the odor of plaintiff's breath, but had signed a statement in his own handwriting three weeks after the accident, which refreshed his recollection that his impression at the time was that he smelled alcohol at the scene of the accident (59a). Furthermore, the jury could conclude this from plaintiff's admission as to his beer drinking at lunch and that evening at a night club, as well as from his denial at the trial that his companion, Rosemary, was drunk just before the accident, in the face of his admission at a prior traffic hearing that she was very, very drunk, they had a big argument and he got out of the car (39a, 4b-7b). He testified that he intended to walk back to town, two and a half miles away (7b).

Petitioner omits from his petition the fact that two police reports, containing identical information, were admitted in evidence (Exhibits B and I, 70a, 72a). Exhibit B was made out in the police officer's own handwriting and Exhibit I was typed by him (19a, 20a, 27a, 28a). The police officer also testified that Exhibit I was

one of a group of papers, all of which were police records of the Provincetown Police Department (24a, 25a). Furthermore, Exhibit I had been sent to plaintiff's counsel by the Provincetown Police Department in response to his request for the same (27a, 28a, 69a).

The statement that defendant was charged with reckless driving (Petition, p. 7) has no page reference, since there is nothing in the record to support this charge, and so the Court below held in its opinion (p. 378).

Reasons for Denying the Petition

Petitioner has advanced three grounds in support of his petition, none of which meets the standards set forth in Rule 19 to justify the grant of certiorari.

(1)

Even assuming, *arguendo*, that there is a conflict between the decision in the case at bar and the First Circuit decision in *Gencarella* v. *Fyfe*, 171 F. 2d 419 (1st Cir. 1948), with respect to the admissibility of a police report in evidence, the point is not available to the petitioner herein, since the pre-trial order stipulated that the police records of the accident "are authentic and may be offered in evidence" (13a, 14a) and the Court below so held (395 F. 2d at p. 378). Accordingly, the issue of whether the report was based on hearsay was neither properly raised nor necessarily decided in this case, and would therefore not be subject to review by this Court.

Furthermore, as was pointed out by the Court below in its opinion (p. 379), even if the report could ordinarily be subject to exclusion for hearsay, the admission here would not constitute reversible error, since both the reporting police officer and the witnesses, upon whose statements his

report was based, testified at the trial and were subject to cross-examination.

It is, therefore, of no import that the First Circuit held a portion of a police report inadmissible in *Gencarella* v. *Fyfe,* 171 F. 2d 419 (1st Cir. 1948), since the instant case did not decide the contrary. It should be noted that the *Gencarella* opinion was written by Circuit Judge Woodbury who, coincidentally, sat on the instant case and apparently did not see any conflict between the two opinions. In fact, the opinion of the Court below held, as in *Gencarella,* that the report would be inadmissible were it not for the fact that the policeman, and the declarants on whose statements the reports were based, testified at the trial (p. 379, §[9]). Thus, the question of the admissibility of the report, *per se,* was not involved in the case.

There is no real conflict of opinion between Courts of Appeal on the question presented. No special and important reasons for granting a writ of certiorari have been presented and the petition should be denied. Cf. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U. S. 70 (1955).

(2)

The appeal to this Court to grant certiorari in order to rule on alleged prejudicial remarks made by defendant's counsel in summation is hardly worthy of consideration under the criteria set forth in Rule 19. The opinion of the Court below thoroughly considered this, as well as other criticisms of counsel's summation, and properly found them unsubstantiated, citing *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 240-242 (1940), "which indicates that isolated and casual statements, although improper, are not prejudicial if they do not reflect the quality of the argument as a whole" (Opinion, p. 378).

(3)

Petitioner, under "Questions Presented", at page 3 of his petition sets forth his third point as follows:

> "III. Where the Court of Appeals holds that the Court's charge was in error in that the jury was instructed that contributory negligence 'in any degree' required a defendant's verdict, can such error be disregarded as harmless?"

and goes on to argue that this Court should grant certiorari to review 28 U. S. C. §2111, "Harmless Error".

It is submitted that this is a non-existent issue. At no point did the Court below cite or invoke Section 2111. It analyzed the charge in depth, and set forth three specific reasons "which militates against reversing this case on the basis of this charge" (Opinion, p. 380). It then, perhaps loosely, added:

> "While the charge might have been improved upon, as we have indicated, we are persuaded that the error was not such as to require a new trial."

It is clear that the Court, in effect, found no reversible error, and did not rely on a determination of harmless error. It was called on to determine the propriety of a charge, a subject governed by State, and not Federal, law. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). Thus the question is not one subject to review by this Court, and, in any event, not worthy of such review.

CONCLUSION

The decision below is clearly correct and is not deserving of review by this Court. The Petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

September 25th, 1968.

Respectfully submitted,

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